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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 196

AMERICAN CHAIN COMPANY, INC., PETITIONER,

v.

ROBERT O. EATON, COLLECTOR OF INTERNAL REVENUE, DISTRICT OF CONNECTICUT, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CHESTER I. LONG,
DAVID S. DAY,
PETER Q. NYCE,
CHARLES P. SWINDLER,
SAMUEL W. MCINTOSH,
Counsel for Petitioner.

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Although the petitioner contends that there were no special findings and for that reason the Court of Appeals could not review the sufficiency of the facts found, yet for the information of this Court reference is made to the following in the record:

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

American Chain Company, Inc., respectfully prays that a writ of certiorari issue to review the final decree of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on the 6th day of March, 1933 (rehearing denied April 6, 1933, R. 413), reversing judgments of the United States District Court for the District of Connecticut. A certified transcript of the record in the

case, including the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with Rule 28, paragraph 1, of the Rules of this Court.

Three actions were brought by the petitioner, American Chain Company, Inc., a New York corporation, against Robert O. Eaton, Collector of Internal Revenue for the District of Connecticut, to the United States District Court for the District of Connecticut for the recovery of excise taxes upon the sale of tire chains manufactured by the petitioner, assessed against the petitioner, under the provisions of Section 900 of the Revenue Act of 1921, subdivision 3, and Section 600 of the Revenue Act of 1924, subdivision 3, which taxes were paid to said Robert O. Eaton, Collector of Internal Revenue.

Section 900 of the Revenue Act of 1921, with which Section 600 of the Revenue Act of 1924 is substantially identical, reads as follows:

> "That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—
>
> "(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;
>
> "(2) Other automobiles and motor cycles (including tires, inner tubes, parts and accessories therefor, sold on or in connection therewith or

with the sale thereof), except tractors, 5 per centum;

"(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;"

* * * * * * *

The three actions were identical as to pleadings, with the exception that each of the three actions covered a different taxable period.

The three actions were tried to the court upon stipulations of the parties waiving trial by jury.

Judgment was rendered by the United States District Court for the petitioner (the plaintiff below) in each of the three actions, and thereupon respondent (the defendant below) appealed to the United States Circuit Court of Appeals for the Second Circuit.

Upon motion of the respondent the District Court ordered that the three actions be consolidated on appeal.

The actions were tried and decided upon the specific issues raised by the allegations of the petitioner, and denied by the respondent, that the tire chains, upon which the excise taxes were assessed and paid, were equally adapted for use on various types of automotive vehicles other than the automobile trucks, automobile wagons, other automobiles and motorcycles specified in said Revenue Acts, and were commonly used on such other types of automotive vehicles, and, therefore,

were not subject to classification as accessories for automobile trucks, automobile wagons, other automobiles and motorcycles.

The specific types of automotive vehicles, with respect to which equal adaptation and common use of the chains were alleged, comprised tractors, fire engines, snow plows, road scrapers, road graders and sprinklers.

The respondent filed in the District Court motions to dismiss on the ground that Section 424 of the Revenue Act of 1928 (Appendix E) precluded a recovery by the petitioner in such actions, and upon a denial of the same by the District Court renewed this objection in motions for judgment for the respondent. The issue raised upon these motions to dismiss and motions for judgment was argued on appeal, but not decided.

A petition for rehearing was filed by the petitioner, and denied by the Circuit Court of Appeals.

The principle of law on which the case was brought and tried is that enunciated by this Court in the case of *Universal Battery Company* v. *United States,* 281 U. S. 580, 74 L. Ed. 1051.

That decision in its direct rulings and in its interpretation and application of administrative regulations establishes a clear-cut line of demarcation for distinguishing articles taxable as accessories "for" the types of automotive vehicles specified in Section 900 of the Revenue Act of 1921 and Section 600 of the Revenue Act of 1924, and articles not so taxable. If a specified article is primarily adapted for use on the type of automotive vehicles enumerated in the Act, al-

though it has other uses for which it is not so well adapted, it is an accessory within the purview of the Revenue Acts. If, on the other hand, the specified article is equally adapted for uses other than an accessory or part for the types of automotive vehicles enumerated in the Acts, and is commonly used for such other purposes, it is not subject to classification as an accessory for the types of automotive vehicles enumerated in the Acts, and, therefore, is not subject to the tax.

The chains manufactured by the petitioner were all sold to jobbers, who, in turn, resold them to retailers, so that at the instant of sale, as of which the tax is imposed, the petitioner had neither knowledge nor means of knowledge as to the ultimate use of any specific set-up of chains. It was necessary, therefore, for the court to make a classification of these chains on the basis of their general ultimate use, or, as the Court holds in *Universal Battery Company* v. *United States, supra,* according to their relation to the enumerated types of automotive vehicles subject to the tax. The one essential issue, therefore, in determining the taxability of the chains was whether, upon the evidence, the chains at the instant of sale could or could not be classified as accessories for the enumerated types of automotive vehicles specified in the Acts.

Upon the trial of the case in the District Court, the petitioner submitted to the court evidence to establish the two particular facts upon the existence of which this Court in *Universal Battery Company* v. *United States, supra,* held that an article could not be

classified for taxation purposes as an accessory for the enumerated types of automotive vehicles, namely, (1) that the chains sold by the petitioners were not primarily adapted for use on such specific types of automotive vehicles, but were equally adapted for use on various types of motor driven vehicles not enumerated in the Acts, and which had been excluded therefrom, to wit, tractors, which were made non-taxable by the specific terms of the Acts, fire engines, which had been held to be non-taxable by the decision of the Circuit Court of Appeals for the Second Circuit in *American LaFrance Fire Engine Company* v. *Riordan*, 6 Fed. (2d) 964, and snow plows, road graders, road scrapers, street sprinklers and other types of automotive vehicles not primarily intended for the transportation of persons or property upon highways, and which had been held non-taxable by departmental rulings (Regulations 47, Article 12, Appendix F), and (2) that the chains were commonly used on such non-taxable vehicles.

Through the testimony of forty-six witnesses there was established not only by personal observations and opinions of the witnesses, but by reproduction of the actual circumstances attending the sale and use of chains, the subordinate facts found by the District Court (R. 30, 31), namely, that chains of the petitioner of the sizes included in the judgment and on which the tax had been assessed "fitted at least one type of non-taxable vehicles equally as well as any taxable vehicle; that they operated as effectively upon the one class of vehicles as upon the other; that wholly without adapta-

tion for the purpose they were interchangeable upon such vehicles of both classes as used tires of substantially the same size; that there was no differentiation either of construction or of design in the chains used on the tires of non-taxable vehicles from those used on tires of taxable vehicles; and that in ordering chains, the universal practice was to order by size only, without specification of the purpose, i. e., whether for taxable or non-taxable vehicles." The evidence by which this general use was proved was derived from witnesses whose field of observation covered practically the entire United States.

The respondent did not offer any testimony directed to the disproving of the facts established by the evidence of the petitioner.

From the subordinate facts referred to above the District Court drew its conclusions of fact upon which its decision was predicated, namely, that the chains which had been subjected to the tax were not primarily adapted for use on the types of automotive vehicles enumerated in the Revenue Acts of 1921 and 1924, but were equally adapted for use on types of vehicles not included in the Acts, and were commonly so used.

The Circuit Court of Appeals reversed the decision of the District Court, first, on the theory that chief use was determinative of primary adaptability and, therefore, of tax liability; and, second, by overruling or disregarding the findings of fact and conclusions of law made by the District Court, and substituting different findings and conclusions.

The respondent requested the District Court to make special findings of fact and conclusions of law. With

this request the court did not comply, other than to enter the order (Record, p. 68) that the findings of fact and conclusions of law stated in the opinion should constitute special findings of fact and conclusions of law.

Specifications of Error.

The Court of Appeals of the Second Circuit erred:

1. In reviewing the general findings and conclusions of the District Court in the absence of special findings of fact and conclusions of law.

2. In rejecting the findings of fact and conclusions of law of the District Court made upon non-conflicting evidence and substituting therefor its own findings and conclusions.

3. In holding that principal use of the petitioner's tire chains was determinative of the question of primary adaptation.

4. In holding that there was an absence of evidence showing that the use of petitioner's tire chains for non-taxable vehicles required an article of the same design as for taxable vehicles.

5. In holding that there was no evidence that the petitioner's chains had the same design or adaptability for use on tractors as on taxable vehicles.

6. In holding that the petitioner's burden of proof required a showing that its tire chains were designed and primarily adapted for some other specific use than that of automobiles.

7. In holding that the petitioner's tire chains were primarily adapted for trucks and automobiles and as parts and accessories for such vehicles.

8. In failing to affirm the conclusion of the District Court that the petitioner's chains were as equally adapted for use on non-taxable vehicles as taxable vehicles, and were commonly used on such non-taxable vehicles.

9. In failing to affirm the conclusion of the District Court that Section 424 of the Revenue Act of 1928 did not preclude the determination by the District Court of the question whether or not the tax assessed against and collected from the petitioner was not collected directly or indirectly from the purchasers of said chains.

10. In failing to affirm the conclusion of the District Court that the tax assessed against and collected from the petitioner had not been collected directly or indirectly from the purchasers of the petitioner's chains.

11. In reversing the decision of the District Court.

Reasons Relied Upon for Allowance of Writ of Certiorari.

(1) The District Court, in this jury-waived case, did not make special findings of fact. It filed an opinion (R. 50) which contains certain general findings which that court afterwards attempted to make special by orders (R. 68, 90, 111). This it was without authority to do. The respondent filed motions in each case at the close of all the evidence (R. 345) for judgments in his favor (R. 21, 81, 102) but these motions were never

passed on by the District Court and, of course, no exceptions were taken thereon during the progress of the trial, although assignments of error were made (R. 376, 385). Motions were also made to dismiss for lack of jurisdiction under Section 424 of the Revenue Act of 1928 (R. 8, 77, 97), which were denied (R. 9), exceptions taken thereto (R. 123) and assignments of error made (R. 348), but the Court of Appeals did not pass on the assignment of error (R. 397). The Court of Appeals made certain findings of fact (R. 394-5-6) which it was without authority to do. The respondent took exceptions to certain rulings of the District Court during the progress of the trial, but while assignments of error were made on such rulings they were not relied on by respondent in the Court of Appeals and no rulings of that court were made thereon. Petitioner contends that under the condition of the record as above set out the Court of Appeals should have affirmed the case for the reason that there was no question of fact or law that it could review and that this case is ruled by *Harvey Co.* v. *Malley*, 288 U. S. —, 77 L. Ed. 621. Under the decision of this Court in *Law* v. *United States*, 266 U. S. 494, 69 L. Ed. 401, exceptions would have been unavailing, for the reason that there were no special findings of fact.

(2) The decision of said Circuit Court of Appeals, in overruling and disregarding the general findings of fact made by the District Court on adequate and non-conflicting evidence, so far departs from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision.

(3) The decision of the Circuit Court of Appeals of the Second Circuit in the instant case is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *McCaughn* v. *Electric Storage Battery Co.*, 63 Fed. (2d) 715, and *Reutzahn* v. *Willard Storage Battery Co.*, of the Sixth Circuit Court of Appeals, decided May 9, 1933, and the decisions of the Court of Claims in *Bassick Manufacturing Company* (72 Ct. Cls. 672), and *Universal Battery Company* (on retrial) decided June 5, 1933. The decision in the instant case being in conflict with the decisions of the Courts of Appeal of the Third and Sixth Circuits and the Court of Claims, this petition for certiorari is presented to review the decision of the Second Circuit Court of Appeals. No petition for certiorari has been presented to this Court by the Solicitor General to review the judgment of the Third Circuit Court of Appeals and the same has become final.

(4) The decision of the Circuit Court of Appeals conflicts with the decision of this Court in *Universal Battery Co.* v. *U. S., supra.*

(5) The decision of the Circuit Court of Appeals is erroneous in considering the design of the inventor as indicative that tire chains were for use only on automobiles, whereas the prior and basic Parson's patent shows other uses for the design, and the court should have considered the design and intention of the manufacturer and seller during the taxable period as controlling (R. 40, 131-134, 138).

(6) That tire chains were not intended to be taxed by the acts of Congress here involved is apparent by

the change in the language used in the enactment of the Revenue Act of 1932 wherein tire chains are specifically named.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said court to certify and send to this Court, on a day to be designated, a full and complete transcript of the Record and of all proceedings of the Circuit Court of Appeals had in this cause to the end that this cause may be reviewed and determined by this Court; that the judgment or judgments of the Circuit Court of Appeals be reversed; and that the petitioner be granted such other and further relief as may seem proper.

AMERICAN CHAIN COMPANY, INC.,
By CHESTER I. LONG,
DAVID S. DAY,
PETER Q. NYCE,
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SAMUEL W. MCINTOSH,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

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No.

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ROBERT O. EATON, COLLECTOR OF INTERNAL REVENUE, DISTRICT OF CONNECTICUT, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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1. The Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals of the Second Circuit was rendered March 6, 1933 (63 Fed. (2d) 783; R. 391); the decision of the Court of Appeals denying motion for rehearing was dated April 6, 1933.

The opinion of the District Court of Connecticut was rendered March 5, 1932 (58 Fed. (2d) 246, 248) (two opinions, first on motion to dismiss for lack of jurisdiction under Section 424, and the other on the merits) (R. 9, 26).

2. Jurisdiction.

The date of the judgment to be reviewed is April 6, 1933, when the Petition for Rehearing was denied.

Jurisdiction of this Court is invoked under Section 240 (*a*), Judicial Code, as amended by the Act of February 13, 1925.

3. Statement of the Case.

The statement of the case has been given in the Petition and in the interest of brevity will not be repeated here.

4. The Questions Presented.

The questions involved are:

1. Whether the Circuit Court of Appeals exceeded its authority in disregarding the general findings of fact and the conclusions of law of the District Court.

2. Whether the Circuit Court of Appeals erred in adopting the rule that chief use is determinative of primary adaptation, in which respect it is in conflict with the decision of the United States Circuit Court of Appeals for the Third Circuit in the case of *McCaughn* v. *Electric Storage Battery Company, supra,* and the decision of the Sixth Circuit in *Routzahn* v. *Willard Storage Battery Company,* and the several decisions of the Court of Claims.

3. Whether the decision of the Circuit Court of Appeals is in conflict with the decision of this Court in *Universal Battery Company* v. *United States, supra.*

5. Statutes.

The pertinent statutes are Section 900 of the Revenue Act of 1921 (quoted in the Statement in the Petition); Section 600 of the Revenue Act of 1924, which is similar, and Section 424 of the Revenue Act of 1928. (Appendix E.)

6. ARGUMENT.

The Circuit Court of Appeals erred and exceeded its authority in overruling the findings and conclusions of the District Court.

There were no special findings of fact and conclusions of law to be reviewed by the Circuit Court of Appeals unless the order of Judge Hincks (Record, p. 68) can be legally given the effect of making the general statement of facts and conclusions of law special findings of fact and conclusions of law. If this order can be given such effect, the Circuit Court of Appeals could have reviewed the findings and conclusions of the District Court only to the extent necessary to determine whether or not they support the judgment of the District Court—otherwise the Circuit Court of Appeals would have no such authority.

Either with or without special findings of fact, the authority of the Circuit Court of Appeals to review the evidence would have been limited to a finding whether or not there was substantial evidence offered to support the judgment.

It clearly appears, however, from the opinion of the Circuit Court of Appeals that its conclusions in revers-

ing the decision of the District Court were predicated upon a rejection of findings by the District Court drawn from evidence supporting the same and of conclusions of fact drawn by the District Court from such findings of fact, and the substitution therefor of different findings and conclusions. This course of procedure deprived the petitioner of its right to have the determination of the facts made by the trial court which heard the evidence.

The general findings in the opinion of the District Court cannot be construed to be special findings upon the order entered by Judge Hincks (R. 68), and under Section 700, R. S., in the absence of special findings the general findings of the District Court are conclusive upon all matters of fact and prevent any inquiry into the conclusions of law embodied therein, except the rulings during the progress of the trial.

Some rulings during the progress of the trial were excepted to and included in the bill of exceptions but were not pressed in the brief or oral argument of the respondent in the Court of Appeals.

In *Fleischmann C. Co.* v. *Forsberg,* 270 U. S. 355, 70 L. Ed. 629, it is said:

> "The opinion of the trial judge, dealing generally with the issues of law and fact and giving his reasons for his conclusions, is not a special finding of facts within the meaning of the statute." (Citing cases.)

The order made by the District Court on April 29, 1932 (R. 90), was ineffective to create special findings.

In *Java Cocoanut Oil Co.* v. *Pajaro Valley Nat. Bank*, 300 Fed. 305 (9th C. C. A.), the court used the following language:

> "At the close of the trial the court filed a written opinion directing a judgment in favor of the plaintiff for a stated amount and closing with the statement 'The foregoing are the findings and conclusions herein'. Judgment was entered accordingly and both parties have brought the case to this court by writ of error treating the opinion of the trial court as a special finding within the proviso of Section 700 (R. S.). The assumption of the parties that the opinion of the court constitutes a special finding is without foundation, and there is therefore no question before us for review." (Citing cases.) "We have not lost sight of the fact that the opinion is here declared to be the findings of the court, *but such a declaration cannot make of the opinion something which it manifestly is not.* * * * Furthermore, if the opinion is to be deemed a finding at all it is a general and not a special one, because it disposes of all the issues in the case and directs a judgment in favor of the plaintiff and in such cases the finding must be either general or special. It cannot be both." (Italics supplied.)

One of the leading cases on this point is that of *Rasmusson* v. *Eddy's Steam Bakery, Inc.* (9th C. C. A.), 57 Fed. (2d) 27. The procedure in that case was very similar to the instant case. The case was tried without a jury and the contention made was that the evidence did not sustain the judgment. That is the contention in this case. A motion was made by the appel-

lant at the conclusion of the testimony for a judgment upon the evidence, which was denied. A similar motion was made in this case. The transcript there contains the "decision" of the trial court dated February 5, 1931, which is reported in 47 Fed. (2d) 247. The trial court made an order in that case, as the District Court did in this, attempting to make its opinion contain special findings of fact. On the 11th of February, 1931, at the request of parties by their counsel in open court the trial court made a special finding, namely, that the defendant collector in demanding and collecting the tax in question acted under the direction of the Commissioner of Internal Revenue. Upon the argument of the case in the Court of Appeals it was suggested that the "decision" of the trial court could be treated as a special finding. After the argument in the Court of Appeals the trial court signed an order *nunc pro tunc* adopting the decision as special findings of fact. The Court of Appeals said:

> "Waiving the jurisdictional question involved, the fact remains that the decision or opinion of the court cannot be treated as special findings in a case at law tried by the court without a jury." (Citing cases.)

Petition for certiorari was filed in the Eddy's Steam Bakery case and opposed by the Solicitor General, who cited the Fleischmann case, using this language:

> "After the appeal was taken the District Court made an order attempting to adopt the opinion as its special findings of fact and conclusions of law. Such an order was obviously

> ineffective. After evidence had been offered respondent moved for judgment in his favor. This was denied, and an exception taken."

Certiorari was denied by this Court on October 10, 1932.

In *British Queen Mining Company* v. *Baker S. M. Co.*, 139 U. S. 222, 35 L. Ed. 147, Chief Justice Fuller, in the consideration of a case tried without a jury under sections 649 and 700 of the Revised Statutes, stated that the finding must be "either general or special"; that it could not be both general and special. In that case it was a general finding. This Court further said:

> "The record contains a bill of exceptions, but no exceptions to the rulings of the court in the progress of the trial of the cause were thereby duly presented, and although after reciting the evidence it is therein stated that 'the court thereafter and during the said term made the following findings of fact and judgment thereon' which is followed by an opinion of the court assigning reasons for its conclusions, this cannot be treated as a special finding enabling us to determine whether the facts found support the judgment, nor can the general finding be disregarded." (Citing cases.)

The only difference between that and the instant case is that in this the District Court made a formal order (R. 90) and there the trial court said the same thing in the bill of exceptions. Both courts endeavored to make special findings in an opinion which this Court has said many times cannot be done.

The Fleischmann case was recently cited and approved in *Harvey Company* v. *Malley, supra,* and this Court repeated the language of Mr. Justice Sanford as follows:

> "The opinion of the trial judge, dealing generally with the issues of law and fact and giving the reasons for his conclusion, is not a special finding of facts within the meaning of the statute. * * * And it is settled by repeated decisions, that in the absence of special findings, the general finding of the court is conclusive upon all matters of fact, and prevents any inquiry into the conclusions of law embodied therein, except in so far as the rulings during the progress of the trial were excepted to and duly preserved by bill of exceptions, as required by the statute."

In the Harvey case, *supra,* this Court quoted in full Sections 649 and 700 of the Revised Statutes (see Appendix A), which govern the extent to which the findings and rulings of the lower court may be reviewed. Respondent took exceptions to certain rulings of the District Court during the progress of the trial, but while assignments of error were made on such rulings they were not relied upon in the Court of Appeals and no rulings were made thereon by that Court (R. 391).

The motions made by Respondent for judgments were not acted upon by the District Court and of course there were no exceptions taken thereto. If there had been, in the absence of special findings, they could not be considered because of the ruling in *Law* v. *U. S., supra,* wherein Justice Brandeis said:

"At the close of plaintiff's evidence the defendant moved for judgment. The motion was denied. No special findings of fact were made. Judgment for $3,335 was entered for the plaintiff upon a general finding, 290 Fed. 972. Upon writ of error sued out by the government the circuit court of appeals reversed the judgment and directed the district court to enter judgment for the defendant. 299 Fed. 61. * * * The government's motion for judgment was made on the ground, among others, that plaintiff had failed to prove that he ever had been, or then was, totally disabled, within the meaning of the contract of insurance.

"The court of appeals held that the motion should have been granted. Its judgment must be reversed and that of the district court must stand, because the case was tried without a jury, and there was only the general finding for the plaintiff. Neither the evidence nor the questions of law presented by it were reviewable by the court of appeals. To inquire into the facts and the conclusions of law on which the judgment of the lower court rests was not permissible." (Citing cases.)

This case is authority on the point that the motions for judgment in these cases at the close of the trial did not change the situation and permit the Court of Appeals to review the evidence, as it did, and come to a different conclusion from that of the district court.

Discussion of Essential Findings of Fact by the Trial Court Which Were Rejected or Modified by the Circuit Court of Appeals.

The Circuit Court of Appeals in its opinion refers to the use of petitioner's chains on non-taxable vehi-

cles as a "diverted use" and one "to which they are not so well adapted".

These rulings were made despite the findings of equal adaptability by the District Court and the evidence of numerous witnesses that identically the same chains were sold and advertised to the trade for use on taxable and non-taxable vehicles, that the chains purchased by owners of non-taxable vehicles were the same chains as those purchased by the owners of taxable vehicles and were purchased by name and without designation of use, that the chains fulfilled the same functions on non-taxable as on taxable vehicles, and that appropriate sizes of chains could be used interchangeably on taxable and non-taxable vehicles, and in their practical use were so interchanged—none of which evidence was controverted by the respondent. (See summary of evidence Appendices C and D.)

The Circuit Court of Appeals made two rulings which not only disregarded and overruled general findings of fact by the District Court, but incorrectly asserted the absence of evidence in support of the findings of the District Court.

The opinion of the Circuit Court of Appeals states (R. 395):

> "In the absence of evidence showing that such diverted uses required an article of the same design and primary adaptation as is required for the automobile truck and other motor vehicle uses, the appellee could not succeed."

The court further stated (R. 396):

> "The appellee admits that the chains involved were chiefly used and adapted for use

> on the vehicles referred to as taxable in the statute and seeks its refund on the basis that such chains were applicable for performing certain duties such as furnishing traction only with respect to other vehicles. Such assumption does not mean that the chains were not designed nor primarily adapted for use on automobile trucks or other vehicles referred to in the statute as taxable. To succeed, the appellee should have shown by evidence adaptation for other uses. In the absence of evidence of such a showing, it was erroneous to hold that chains equally adapted for a variety of uses for traction purposes only and commonly put to such uses, one of which is on automobiles, cannot be classified as parts or accessories of such vehicles."

The opinion further states (R. 395):

> "Indeed, there is no evidence that the chains referred to by the Court below had the same design or primary adaptation for use on tractors."

The incorrectness of these three statements by the court is proved by reference to the evidence, of the following witnesses which comprise only a small part of the evidence directed to the proof of the facts referred to by the Court—reference being made to the summary in Appendix D for additional evidence:

William A. Palmer (R. 163); Walter J. Kretlow (R. 247); George B. Kutz (R. 252, 253); William E. Wissler (R. 231).

The opinion of the Circuit Court of Appeals states (R. 396):

> "It was incumbent upon the appellee to establish that the Weed chains were not designed or primarily adapted to use on automobile trucks, automobile wagons, other automobiles and motorcycles. This burden required a showing that the specific chains sold and for which the tax was imposed were designed and primarily adapted for some other specific use than that of automobiles."

This ruling evidences a misunderstanding of the finding of the District Court. The District Court did not hold that proof of adaptation of any specific size of chains for use on a non-taxable automotive vehicle was sufficient to exempt that size of chain from the tax.

The District Court first found that Weed tire chains as a generic class were equally adapted for use on non-taxable vehicles as well as taxable vehicles, and that they were commonly used on non-taxable vehicles. The District Court then held that any specific size of chain was exempt from taxation only when the proof supported the fact that there was a non-taxable vehicle requiring that specific size of chain. This fact having been established the District Court ruled that the common use of the specific sizes of chains on non-taxable vehicles might be proved by circumstantial evidence.

The ruling of the District Court on this point is as follows (R. 39):

> "To prove a use for a chain of any given size on non-taxable vehicles, it was indispensable for the plaintiff to show that a non-

> taxable vehicle existed calling for that specific size of chain. The existence of the use thus established, that it was a common use might be proved by circumstantial evidence. And all chains of sizes thus proved to have an actual and common use with non-taxable vehicles were thereby shown to be commodities other than accessories for taxable vehicles."

The Circuit Court of Appeals in its opinion states (R. 395):

> "No effort has been made to show that the tensile strength, twisting strains or weight of the chains was different from those used and usable on automobile trucks or other automobiles."

This indicated requirement is exactly contrary to the ruling of the Supreme Court in *Universal Battery Company* v. *United States, supra*, that to take a specific article out of the taxable classification, there must be an equality of adaptation for uses other than in connection with taxable vehicles. If the chains for use on non-taxable vehicles required a different tensile strength or weight than chains for use on taxable vehicles, Petitioner would have had no right of recovery, for that fact would have furnished a means for classification of its chains as between chains adapted for the taxable types of motor vehicles and those adapted for the non-taxable types of motor vehicles. In this reference the Circuit Court of Appeals apparently misunderstood a conclusion reached by the District Court.

On the trial of the case in the District Court, the Respondent advanced the claim that proof of equal adaptability of chains for non-taxable vehicles could only be established through proof of identical duty requirements, such as tensile strength, twisting strains and weight. This claim on the part of the Respondent went, of course, only to the weight and sufficiency of the Petitioner's evidence, and that the claim was given full consideration by the Court is indicated by its discussion of this claim in its opinion (R. 40):

> "Again, the defendant argues that the question of adaptability is one which can be established only by proof of duty requirements. As to this claim, it need only be said that the Act, the Regulations, and all the reported cases contain no basis for the contention. And it is well established that the question of mechanical adaptability may be shown by pragmatic evidence that the mechanism in question does in fact function. Here, there is an abundance of testimony that the identical chain used on an automobile functions equally well on a non-taxable vehicle. That the testimony is the product of actual experience as distinguished from mathematical computation does not vitiate its admissibility and, if anything, adds to its weight."

It is respectfully submitted that the above overruling by the Circuit Court of Appeals of general findings of fact made by the District Court on adequate and uncontroverted evidence, and the adoption of assumptions of fact, neither deducible from the findings of the District Court nor from the evidence, is not

only erroneous, but also represents an exercise of judicial authority not vested in the Court on an appeal in an action at law.

The extent to which the above rulings on the facts by the Circuit Court of Appeals controlled its ultimate decision is evidenced by the conclusions drawn from the opinion in the instant case by the Circuit Court of Appeals for the Sixth Circuit in *Routzahn* v. *Willard Storage Battery Company,* decided May 9, 1933 (not reported). In that case the court affirmed a judgment of the District Court for the Northern District of Ohio in favor of the taxpayer based on a finding of facts essentially similar to that of the District Court in the present case. In its opinion that Court used—as distinguishing the instant case from the one there under consideration—the specific ruling of fact by the Circuit Court of Appeals for the Second Circuit discussed above—that there was no proof in the instant case that the chains were designed or adapted for any other specific use than for automobiles.

CHIEF USE.

The Circuit Court of Appeals erred in holding that chief use of the petitioner's tire chains was determinative of primary adaptation.

In the opinion of the Circuit Court of Appeals in this case, there are the following statements:

> "It was concluded below that the primary adaptation rule, referred to in *Universal Battery Co.* v. *United States* (*supra*), has no application to cases where the appellee, by evidence

of subsequent untaxed resales, shows two uses, one of which is the admitted principal use on automobiles and the other is a possible exempted use even though it be a diverted use. We think such a conclusion ignores the chief or principal use as being determinative of the primary adaptation rule, referred to by the Supreme Court, and it also assumes evidence of untaxed resales for possible diverted uses, sufficient to override the primary adaptation rule" (Record, p. 395).

"We therefore conclude that the chains for which the tax has been imposed were primarily adapted for use and chiefly or principally used for motor vehicles, enumerated in the statute, which were taxable, and are to be regarded as parts or accessories of such vehicles even though there has been some other use of the articles for which they are not so well adapted. *Universal Battery Co.* v. *United States, supra*" (Record, p. 395).

"But where the chains were sold, and are predominantly and chiefly used, as parts or accessories of such automobile trucks, other automobiles and motorcycles, the sales are taxable in the absence of evidence showing the chains involved were not designed and primarily adapted for such use. The appellee has failed to establish its non-taxable sales" (R. 396).

In the case of *McCaughn* v. *Electric Storage Battery Company*, the opinion states:

"The fact that automobiles are the largest users of storage batteries, is not decisive of the case. That they are the largest users is a fact, but taxability of a battery under this statute depends, not upon the quantity used, but upon

whether or not it is primarily adapted for use in an automobile and not equally adapted to any other use requiring the same load. Unless it fulfills these two requirements, it is not a 'part or accessory' within the meaning of this statute. Judge Kirkpatrick, who saw the witnesses and heard all the testimony, has expressly found it is not and the testimony, fairly interpreted, as a whole and not fragmentarily, abundantly supports his findings. These findings being supported by the evidence are, under the facts of this case, conclusive upon us."

It is apparent that there is a direct conflict in these two decisions as to the effect to be accorded chief use in determining liability or non-liability for the tax. Obviously the Circuit Court of Appeals for the Second Circuit is in error in applying the doctrine of chief use in determining primary adaptation. An article may have an equal adaptation for a purpose in which its quantity use is restricted. Chief use can properly be given consideration by a Court in reaching a conclusion of fact as to primary adaptation as against equal adaptation. Likewise, chief use can properly be given consideration by a Court in reaching a conclusion of fact as to the existence of common use, but certainly chief use for one purpose could never unqualifiedly negative common use for another purpose. Obviously any article may have a preponderance of use for one purpose, but a common use for other purposes. It would be contrary to the rule of strict construction of tax statutes in favor of the taxpayer to classify any article as an accessory for the types of

automotive vehicles enumerated in the act, when such articles have a common use throughout the country for non-taxable vehicles.

Neither in the findings of the District Court nor in the evidence was there any substantial basis for this finding of chief use by the Circuit Court of Appeals.

There was no evidence before the District Court as to the comparative number of chains used on taxable and non-taxable vehicles from which such a conclusion could be drawn. The District Court found (R. 30):

> "From the evidence I find that the chains in question were all sold by the plaintiff to jobbers and dealers, so that even the plaintiff did not know, and could not know, how many of the chains thus sold were eventually used or purchased for use on non-taxable vehicles."

It was conceded that the number of taxable motor vehicles exceeded the number of non-taxable motor vehicles, and the District Court in reaching its conclusions gave consideration to that fact, as indicated by the following statement from its opinion (R. 31):

> "It may also be noted that the number of taxable vehicles during the taxable periods exceeded the number of non-taxable motor vehicles. If that fact was not fully established by competent evidence, at least it was conceded by the plaintiff on brief."

Even if the doctrine of chief use could properly be given the legal force and effect ascribed to it by the

Circuit Court of Appeals, a conclusion as to the existence of chief use as a fact must necessarily be predicated on something more specific than a mere indefinite preponderance in the number of taxable vehicles over non-taxable vehicles.

The reference of the Circuit Court of Appeals to the case of *Perfection Gear Company* v. *United States*, 41 Fed. (2d) 561, is not in point. In that case the Court found the articles in question (timing gears) were specially designed and primarily adapted for automobiles and trucks, thus giving them a classification as accessories therefor—the court holding that in such circumstances a taxpayer was liable for the tax on all of the timing gears, except those which the taxpayer could definitely prove were employed in a non-taxable use. This ruling accords with Regulations 47, Revised Article 16. In the present case the District Court found as facts the equal adaptation of chains for non-taxable vehicles and common use for such purpose, which under both court and departmental rulings precludes the classification of chains as accessories for the automotive vehicles enumerated in the Revenue Acts.

Decision of the Circuit Court of Appeals is in conflict with the decision of this Court in Universal Battery Company v. United States, supra.

There have already been considered in the preceding argument various conclusions of the Circuit Court of Appeals which are at variance with the rulings of this Court in the case of *Universal Battery Company* v. *United States, supra.*

There are two further rulings of the Circuit Court of Appeals which are directly at variance with the ruling of this Court. The opinion of the Circuit Court of Appeals states (Record, p. 396):

> "It was incumbent upon the appellee to establish that the Weed chains were not designed or primarily adapted to use on automobile trucks, automobile wagons, other automobiles and motorcycles. This burden required a showing that the specific chains sold and for which the tax was imposed were designed and primarily adapted for some other specific use than that of automobiles."

The Circuit Court of Appeals is correct in its conclusion that the burden rested upon the petitioner to prove that the chains were not primarily adapted for use on the types of motor vehicles enumerated in the Revenue Acts. To meet this burden, however, did not require proof by the petitioner that the chains were primarily adapted for use on non-taxable types of motor vehicles. This Court applied the rule of equal adaptability, which is the antithesis of primary adaptability. There can be no primary adaptability for any one purpose where there is equal adaptability for two or more purposes. Therefore, the petitioner in establishing the fact, as found by the District Court, that the chains were as equally adapted for use on non-taxable as on taxable vehicles, met in this respect its full burden of proof.

The opinion of the Circuit Court of Appeals states (Record, p. 393):

"The patent rights secured from the United States clearly specify that the chains were adaptable for use on automobiles to prevent skidding. They were described as primarily useful for this purpose. If Congress had intended to give exemption to such an accessory to an automobile, it would have so stated as it did in the case of tractors by reference in the statute, or it would have limited the language of the statute so as to afford clearly an exemption therefor, but it used the words 'parts or accessories'. The use of such generic words intended, we think, that they should be given a broad significance to effectuate the purposes of the statute."

This conclusion is at variance with the ruling of this Court in the case of *Universal Battery Company* v. *United States, supra,* in two respects:

First. The word "primarily" used in conjunction with "adapted" has two distinctive meanings: One—first in order of time; two—first in rank, which would denote a fitness for a specific use superior to that of its fitness for any other use. Obviously the second meaning is the one with which it is employed by this Court and in the Regulations, because the term "primarily adapted" is used as the antithesis of "equally adapted". This is further evidenced by the fact that Regulations 47, Article 16, uses the word "peculiarly" as the equivalent of "primarily" in the definition of articles excluded from classification as accessories.

"Articles which have a general commercial use and which are not especially designed and

peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles or motorcycles are not subject to tax as 'parts' or 'accessories'."

Also, it is apparent from the standpoint of commercial use that first adaptation in point of time, or even primary adaptation at a time antedating that under consideration, is without relevancy. Electric current was first commercially employed in the telegraph, but today there are hundreds of uses for which it is equally well adapted, although the extent of use differs according to the requirements of each particular use. Pneumatic tires were first employed on horse-drawn vehicles and bicycles, but at the present time they are equally adapted for use in connection with motor driven vehicles. Therefore, the Court, in reaching the above stated conclusion, has fallen into the error either of according to "primarily" its meaning of first in order of time, or of drawing its conclusion from a commercial status existing at the date of the granting of the patent, entirely different from the commercial status existing during the taxable period.

Second. The conclusion that if Congress had intended to except chains, it would have specified them as it did in the case of tractors, is inconsistent with the ruling of this Court in the case of *Universal Battery Company* v. *United States, supra,* and a number of decisions in the lower courts and departmental rulings, which have held to be non-taxable various articles which in their use have a relationship to the motor vehicles specified in the Revenue Acts similar to chains.

This conclusion of the Circuit Court of Appeals also ignores its own decision in the case of *American La France Fire Engine Company* v. *Riordan, supra,* in holding fire engines to be non-taxable, although not specifically exempted in the Act, as were tractors.

The only consistent conclusion from the wording of the Act is that if a legislative intent to tax chains had existed, chains would have been specifically named, as were tires.

The case of *Bassick Manufacturing Company* (No. 350, consolidated in this Court in the *Universal Battery Company case, supra*) was again tried in the Court of Claims (72 Ct. Cls. 672) and decided on October 20, 1931. The Court of Claims, following the Universal Battery Company opinion, set aside its former judgment and gave judgment for the plaintiff.

After the decision of this Court in *Universal Battery Company, supra,* No. 127 was again tried by the Court of Claims. That Court, in an opinion dated June 5, 1933, gave judgment for the plaintiff.

The court found that

> "the Plaintiff's batteries were not specially designed for use upon automobiles but were equally adapted to a variety of uses other than upon automobiles and automobile trucks and were commonly sold for and commonly put to such uses. None of the batteries sold by the plaintiff upon which the tax was paid were manufactured with any characteristic which made them adaptable for use in automobiles and automobile trucks only or prevented the use of these batteries for non-automobile purposes. None

of them were so designed or constructed as to make them primarily adapted for use on automobiles, automobile trucks, automobile wagons, or motorcycles."

Similar findings were made in the instant case by the District Court and should have been followed by the Circuit Court of Appeals.

CONCLUSION.

The District Courts of Connecticut, the Eastern District of Pennsylvania, the Northern District of Ohio, and the Court of Claims have followed the rule enunciated by this Court in *Universal Battery Company* v. *United States, supra.* The District Courts of Pennsylvania and Ohio have been affirmed by the Courts of Appeal in the Third and Sixth Circuits. The decision of the Circuit Court of Appeals for the Second Circuit represents a departure from the uniform application of this rule, a modification of the scope and intent of the rule as enunciated by this Court and a disregard of the fundamental principles of appellate procedure.

For these reasons and because of the importance of the questions involved, it is respectfully submitted that the prayer of the Petitioner should be granted.

Respectfully submitted,

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APPENDIX "A."

Sections 649 and 700 of the Revised Statutes, as amended, provide:

> "Sec. 649. Issues of fact in civil cases in any district court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." (U. S. C. title 28, Par. 773.)
>
> "Sec. 700. When an issue of fact in any civil cause in a district court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment." (U. S. C. title 28, Par. 875.)

APPENDIX "B."

General Findings of the District Court in Its Opinion (R. 31).

The findings of the District Court are set out in its opinion and are therefore general and not special. They were based on the evidence as follows:

> "From the evidence I find that the chains in question were all sold by the plaintiff to job-

bers and dealers, so that even the plaintiff did not know, and could not know, how many of the chains thus sold were eventually used or purchased for use on non-taxable vehicles; that said chains generally were advertised by the plaintiff for use on non-taxable vehicles, as well as taxable ones; that said chains were manufactured in a multitude of sizes, varying not only in length of the side or rim chain, but also in the length of the cross chain, and generally heavier wire was used throughout in construction of the larger sizes. Of this number, however, 49 sizes which will be listed in Schedule 'A' hereinafter referred to, fitted at least one type of non-taxable vehicles equally as well as any taxable vehicle; that they operated as effectively upon the one class of vehicles as upon the other; that wholly without adaptation for the purpose they were interchangeable upon such vehicles of both classes as used tires of substantially the same size; that there was no differentiation either of construction or of design in the chains used on the tires of non-taxable vehicles from those used on tires of taxable vehicles; and that in ordering chains, the universal practice was to order by size only, without specification of the purpose, *i. e.*, whether for taxable or non-taxable vehicles (R. 30, 31). * * * I conclude that the chains listed in Schedule 'A' were not primarily adapted for use on taxable vehicles but were equally adapted for use on non-taxable vehicles. Although, as stated, the plaintiff did not and necessarily could not prove by direct evidence that any particular chain found its way to the wheel of a non-taxable vehicle, yet from the evidence that the sizes listed in Sched-

ule 'A' were adapted for such use and that it was common practice for all types of non-taxable vehicles generally to use such chains and indeed that the use of such chains was often required for the successful and efficient operation of such vehicles, I conclude that the sizes listed in Schedule 'A' were actually used on non-taxable vehicles and that such use was common, substantial and profitable—not exceptional or experimental only (R. 31). . . . The list of sizes, 49 in number, for which a non-taxable use was shown, together with the amounts of taxes paid on all chains of each such size, sold during each of the three taxable periods, are shown on Schedule 'A' which may be attached hereto and shall constitute a part of the findings herein" (R. 32).

The non-taxable vehicles referred to by the District Court were of four classes:

1. Tractors that are made non-taxable by the statute.

2. Fire engines and fire apparatus, which were found to be non-taxable in *American-La France Fire Engine Co.* v. *Riordan*, 6 Fed. (2d) 964. That decision was by the Second Circuit Court of Appeals and not reversed by this Court. The Regulations were amended to accord therewith, T. D. 3782, IV 50-2497.

3. Self-propelling machines, such as concrete mixers, stone crushers, etc., and machines which perform a mechanical function as they move along the highway, such as road graders and scrapers, sprinklers, etc., which are held to be non-taxable under Regulations 47, Article 12. (Appendix F.)

4. Motor-driven station and factory trucks for use in factory yards and railroad stations, and not on highways and roads, are held non-taxable by Regulations 47, Article 12. (Appendix F.)

That the above vehicles are those that are held by the District Court to be non-taxable, is shown by the following (R. 34):

> "Thus by express provision of the act, by judicial decision, and by Treasury Regulations, certain types of automotive vehicles are held to be exempt from the excise tax. It is to such vehicles, of course, that I had reference when in the findings of fact above I used the term 'non-taxable' vehicles, and for brevity I shall use the phrase in the same meaning throughout this opinion. Similarly, the words 'taxable vehicles' will be used to denote all vehicles subject to tax under this act."

The District Court set out the statute in its opinion (R. 33) and the Regulations 47 (R. 35). The District Court further found (R. 36):

> "At the outset it must be noted that the act does not impose a tax upon *accessories*. Instead the tax attaches only to the sales of '*accessories for any of the articles enumerated*', i. e., taxable vehicles." (Italics supplied.)

APPENDIX "C."

Although the Petitioner contends that there were no special findings and for that reason the Court of Appeals could not review the sufficiency of the facts found, yet for the information of this Court reference is made to the following in the record showing:

(*a*) *Evidence proving that Weed chains were not especially designed for use on automobiles and trucks.*

Weed Tire Chains were not made especially for tractors, automobiles or trucks (R. 180, 227); that during the taxable period chains were not purchased as designated for tires of tractors or automobiles, but were bought by sizes (R. 190); that Weed Tire Chains used on automobiles and trucks had no peculiar characteristics or design which were not identical to Weed Chains for use on tractors, fire apparatus and road machines, the general design being the same and differing only in weight as the size of the chain increases (R. 203, 212, 241, 127, 221); that there was no tire chain specially made for a tractor, but the chain in existence at the time of the advent of the tractor was applied to the tractor (R. 209, 236, 257); that there was nothing to prevent the use of the usual car tire chain on a truck or a pneumatic truck tire chain, on a solid tire, or a single or dual, other than the weight of the material used in construction of the chain (R. 212); that Weed Tire Chains made during the taxable period were similar in design and make to those that are manufactured by the company at the present

time and would fit the standard make of tires of all automobiles, trucks, and road machines, regardless of their use (R. 124); that they could be detached from automobile and truck tires and used on the same size tires of tractors, fire apparatus or road machines without any change in the chains (R. 128, 221); that there was no difference in the kind of Weed Chains sold in one part of the United States and Canada from what was sold in any other part (R. 130); that Weed Chains were generally used on Walter snow fighters without inquiry being made as to whether they were especially designed for snow fighters and they performed the identical function as chains on an automobile, when the sizes that would fit the tire of the machines were used (R. 160, 161); that the company did not manufacture a chain especially designed and sold for trucks (R. 226, 227), or for use on fire equipment, or for use on self-propelling motor-driven machines (R. 190, 199, 228); that the chains which the company manufactured and sold for automobiles and trucks were of the same design generally as those which they manufactured and sold for tractors, road maintenance machines, and fire apparatus (R. 196). (The witnesses who testified to the above were residents of Minneapolis, Minnesota; Omaha, Nebraska; Kansas City, Missouri; Des Moines, Iowa; Chicago, Illinois; Atlantic Beach, Long Island; and Evanston, Illinois.)

(*b*) *Weed chains were equally adapted for and during the taxable period were commonly used on tractors, fire apparatus, and road machines as well as on automobiles and trucks.*

Weed Tire Chains were used on tractors and trucks; in ordering chains no distinction was made as to whether they were to be used on trucks or tractors (R. 163, 252); that in storing the chains, they did not keep those for trucks separate from those for tractors (R. 178) and no special barrels or bins were kept for storing chains to fill orders of State highway commissions for fire apparatus or police equipment (R. 248) and orders from State highway commissions for chains were filled out of regular stock as they were if they were orders for private automobiles or trucks (R. 248); that if an order came for a set of dual chains for tractors they would be taken off the same pile as if ordered for the same size truck (R. 179) there being no markings showing which were truck chains and which were tractor chains (R. 179); that Weed tire chains could be used on tractors and road equipment as well as on trucks and automobiles (R. 185); that they were used on Fordson tractors and International and Liberty trucks (R. 205); that they could be used as well on tractors as on automobiles (R. 209); that particular sizes of chains may be used on any type of vehicle having rubber tires, either solid or pneumatic, if the sizes were comparable (R. 217); that a Weed chain of a suitable size could be used just as well on a tractor as on a truck (R. 229, 252, 299, 127, 219); that Weed chains sold for use on fire apparatus, police and road equipment did not differ in any way from the Weed chains sold and used on private automobiles and trucks; that there were no peculiar characteristics about a Weed chain that prevented it from being sold for general use as a commercial commodity and which

made it primarily adapted only for use as a component part of a privately owned automobile or truck (R. 231, 232); that Weed chains were used for road maintenance and road equipment and for the fire department of Chicago and other municipalities and for tractors (R. 241); that the difference in Weed chains used on automobiles and those used on fire apparatus was primarily a difference of size (R. 147); that Weed chains were used on Fox rotary snow brooms (R. 154) and Walter snow fighters (R. 158) and a chain of appropriate size that will fit on an automobile or a truck could be used on a fire apparatus or road equipment equally as well (R. 220).

(c) *Weed chains were interchangeable and could be used equally as well on tires of automobiles, trucks, tractors, fire apparatus and road machines.*

Weed Tire Chains were interchangeable for use on automobiles and trucks or tractors, if the proper sizes were used, without any change in the chains (R. 164); that chains commonly used on trucks could be used on tractors without any substantial change (R. 168, 199); that in buying chains it was not specified that they were for use on tractors or trucks but they were used interchangeably (R. 178); that a Weed tire chain could be taken off a Pierce Arrow or the Liberty trucks and used on a Fordson tractor (R. 182); that a pair of Weed chains meant for a tractor could be used on a Packard car (R. 192); that a pair of chains used on a fire engine were used on a Ford (R. 166); that chains used on fire apparatus worked just as well on a Loco-

mobile (R. 170); that tire chains may be detached from automobile or truck tires and attached to tires of the same size on tractors, fire apparatus, road equipment vehicles, without any change or adaptation (R. 193, 203, 213, 231, 253, 274, 283, 128, 221); that specific sizes of Weed chains could be placed on tires requiring those sizes and that a 40 x 5 chain could be put on a 38 x 6 tire (R. 207); that the size on a truck and a tractor being the same, the truck chain would come right off the truck onto the tractor (R. 214) and you could interchange them providing the tire sizes are the same; that Weed Tire Chains were used on fire apparatus, tractors, road maintenance machines such as graders, snow plows, and similar vehicles including road sprinklers (R. 196); that Weed Chains used on fire apparatus and road equipment did not differ in any way from Weed Chains sold and used on private automobiles and trucks; they were interchangeable (R. 221).

APPENDIX "D."

The incorrectness of statements in the opinion of the Circuit Court of Appeals is proved by the following excerpts of evidence which comprise only a small part of the evidence directed to the proof of the facts referred to by the Court:

> William A. Palmer, General Foreman of Maintenance, District 9, of the State of Minnesota, testified (R. 163) that the regular stock Weed chains were used on tractors, and were ordered by sizes. He stated as follows:
>
> "We made no distinction as to whether they were to be used on trucks or tractors, just used them as we saw fit."

Walter J. Kretlow, a warehouse manager for the appellee, testified (R. 247):

"I filled orders for the City of Chicago designating delivery at 35th Street, and also on, I think, Loomis Street, out of our regular stock that we sold for automobiles, tractors and trucks, indiscriminately according to size."

George B. Kutz, salesman for the American Chain Company, testified (R. 252):

"A Weed chain of suitable size can be used as well on a tractor as on a truck. I sold chains that were put to use on tractors. I took orders for chains for the jobbers. I have sold chains for use on tractors, fire apparatus and road equipment used in the construction and maintenance of roads."

and, on page 253, he testified,

"Weed chains for use on automobiles and trucks have no peculiar characteristics which are not identical with Weed chains for use on tractors, fire apparatus or road equipment. Weed chains may be detached from automobile and truck tires and used on tires of the same size on tractors, fire apparatus or road equipment without any change in the chains. The Weed chains sold by me during the taxable period in my territory for use on fire apparatus, police and road equipment did not differ in any way from the Weed chains sold and used on private automobiles and trucks."

William E. Wissler, engaged in the wholesale automotive business at Des Moines, testified (R. 231):

"Weed chains for use on automobiles and trucks have no peculiar characteristics which are not identical with Weed chains for use on tractors, fire apparatus, or road equipment. Weed chains may be detached from automobiles or truck tires and used on tires of the same size on tractors, fire apparatus or road equipment without any change in the chains."

APPENDIX "E."

Section 424 of the Revenue Act of 1928 reads as follows:

(*a*) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the

United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

(*b*) The second proviso under the heading "Internal Revenue" in section 1 of the First Deficiency Act, fiscal year 1928, and the second proviso of the fourth paragraph under the heading "Internal Revenue Service" in section 1 of the Treasury and Post Office Appropriation Act for the fiscal year 1929, are repealed.

APPENDIX "F."

Regulations 47.

Article 12. Excise Tax Regulations (Revised December 1920).

"Art. 12. Automobile trucks and automobile wagons.—The tax is 3 per cent of the price for which automobile trucks and automobile wagons are sold by the manufacturer. It applies to automobile trucks and automobile wagons primarily designed or adapted for the transportation of property along highways and roads, although persons may incidentally be transported at the same time, as outlined in article 11, and to automobile truck and automobile wagon chassis as defined in article 15.

"For example, fire apparatus, including fire engines, hose carts, hook and ladder trucks, water-tower trucks, etc., tank trucks for carrying oil, gasoline, water, etc., moving and furniture vans, and drays, delivery wagons, etc., are all taxable as automobile trucks, and wagons. Automobile hearses are taxable as automobile trucks or automobile wagons.

"An automobile truck or automobile wagon formed by joining together a so-called tractor or 'semitractor' which carries or bears a portion of the load, and a so-called trailer or 'semitrailer' is taxable as a whole as an automobile truck or an automobile wagon.

"When sold separately the so-called tractor or 'semitractor' is taxable as an automobile truck or automobile wagon, and the so-called trailer or 'semitrailer' as a 'part' of an automobile truck or automobile wagon.

"Motor-driven machines for pulling or drawing vehicles around factories and railroad stations, small trucks for handling baggage and trunks at railway stations and for transporting materials, articles, or goods around factories and adapted for restricted use in factory yards or elsewhere as distinguished from use on highways and roads, are not subject to tax.

"Self-propelling motor-driven machines, such as concrete mixers, stone crushers, excavating shovels, ditch diggers, etc., and machines which perform a mechanical function as they move along highways and roads, such as road graders, road scrapers, street sweepers, road sprinklers and oilers, are not taxable. Where, however, the mechanical part of a machine, as the mixing machine of a concrete mixer, the blades of a road scraper, the tank of a street sprinkler or the boiler of a road oiler, is superimposed or mounted on a truck chassis, the chassis is taxable at 3 per cent when sold by the manufacturer.

"Motor propelled wheel or rolling chairs, motor-driven machine gun and artillery carriages of the trac-

tor type, motor-driven railroad cars and vehicles designed and adapted solely for use on rails or tracks, and not capable of use on highways and roads, are not taxable.

"Any tires, inner tubes, parts or accessories for automobile trucks and automobile wagons sold on or in connection therewith or with the sale thereof are taxable at 3 per cent as part of the selling price of the automobile truck or automobile wagon. This applies only to such tires, inner tubes, parts or accessories as are not in excess of the quantities usually sold in the ordinary course of trade to a single customer at the time and in connection with the sale of an automobile truck or an automobile wagon. Any quantity of tires, inner tubes, parts or accessories in excess of this amount is taxable under subdivision (3) at 5 per cent of the selling price thereof.